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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STEWART and ANNE KING — Petitioners

v.

W.R. KING — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

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QUESTION PRESENTED

Are the happily married and perfectly fit natural parents of an infant child deprived of liberty in violation of the Fourteenth Amendment to the United States Constitution by a state law pursuant to which a court has ordered them to involuntarily surrender the child to the custody of a grandparent for periodic visitation?

PARTIES TO THE PROCEEDINGS BELOW

The parties to this proceeding were also the parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

Petitioners, Stewart and Anne King, respectfully pray that a Writ of Certiorari issue to review the decision of the Kentucky Supreme Court entered on March 12, 1992.

OPINIONS BELOW

The opinion of the Kentucky Supreme Court is reported at 828 S.W.2d 630 and is reprinted in the Appendix at pages A1 - A18. The opinion of the Court of Appeals of Kentucky is not officially reported, but it is reprinted in the Appendix at pages A19 - A21. The Orders of the Boyle County Circuit Court are reprinted in the Appendix at pages A22 - A28. The Order of the Kentucky Supreme Court denying rehearing is reprinted in the Appendix at page A29.

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on March 12, 1992. A timely Petition for Rehearing was denied on June 4, 1992. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Kentucky Revised Statute 405.021 provides in its entirety :

> REASONABLE VISITATION RIGHTS TO GRANDPARENTS.
> (1) The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
>
> (2) The action shall be brought in circuit court in the county in which the child resides.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioners Stewart and Anne King are husband and wife. They have a single child, Jessica, born April 24, 1987. Respondent W.R. King is Stewart's father and Jessica's paternal grandfather.

Stewart, Anne and Jessica once lived happily together as a family in a house on farmland owned by W.R. King in Boyle County, Kentucky. Stewart was employed full-time at a factory in Danville, Kentucky, but also did work on the farm. As compensation for this work, W. R. allowed Stewart, Anne and Jessica to live rent-free in the farmhouse, and Stewart received a portion of the annual proceeds from the farm's tobacco crop.

W.R. expected a great deal of Stewart regarding operation of the farm and came to believe that Stewart was not putting in enough hours. Stewart was very involved in raising his daughter and believed that W.R.'s demands and interference kept him from spending time with Anne and Jessica. This interference affected both Stewart's relationship with Jessica and his marriage to Anne.

W.R. became upset when sickness to Stewart, Anne and Jessica prevented Stewart from working. On or about September 15, 1988, W.R. told Stewart, Anne and Jessica to leave the farm. Tired of W.R.'s demands, the family immediately did so. Shortly thereafter, W.R. asked Stewart and Anne if he could visit with Jessica. Stewart and Anne denied the request, fearing that W.R.'s domineering personality and his cohabitation out-of-wedlock with Emarine Cash would be negative influences on Jessica, and that W.R. would try to turn Jessica against them.

W.R. next obtained legal counsel, who wrote a letter to Stewart and Anne which threatened a lawsuit and demanded that W.R. be allowed visitation with Jessica. After Stewart and Anne failed to respond to W.R.'s demand, W.R. filed a petition in the Boyle County Circuit Court pursuant to Kentucky Revised Statute ("KRS") 405.021. This statute empowers a court to grant visitation rights to a grandparent if such visitation is in the "best interest of the child." KY. REV. STAT. ANN. § 405.021 (Baldwin 1991).

Stewart and Anne denied the allegations of W.R.'s petition and challenged the constitutionality of KRS 405.021. The trial court declined to find KRS 405.021 unconstitutional, stating that "similar statutes in other states have been universally upheld as constitutional." The trial court also granted W.R.

temporary visitation while the parties, including Jessica, underwent court-ordered psychological evaluation at the local Comprehensive Care Center.

Stewart and Anne filed a motion to alter, amend, or vacate the court's ruling. A second hearing was held, and the court heard further testimony from Stewart and Anne. On January 6, 1989, the court upheld the constitutionality of KRS 405.021 without additional discussion. On the basis of the Comprehensive Care Center's report, the court granted W.R. permanent visitation with Jessica from 4 p.m. to 7 p.m. each Wednesday and Saturday. The court based its ruling on a finding that there were no allegations that it was not in the best interest of Jessica to allow W.R. to have visitation. The court's Order allows Ms. Cash, then W.R.'s housemate and now his wife, who was not related to the Kings at all, to pick up Jessica for W. R.'s visitations under some circumstances.

Stewart and Anne appealed to the Kentucky Court of Appeals. The Court of Appeals reversed the decision of the trial court and remanded with directions to dismiss W.R.'s petition. The Court of Appeals held that W. R. had produced no evidence that it was in Jessica's best interest to have forced visitation with him. "Nowhere in his testimony does he address the child's best interest," stated the Court of Appeals' opinion. The Court of Appeals also concluded that the report from the Comprehensive Care Center standing alone did not satisfy the legal burden. Thus, the Court of Appeals did not reach the issue of the constitutionality of KRS 405.021.

The Kentucky Supreme Court granted discretionary review and reversed the decision of the Court of Appeals. In so doing, the Supreme Court explicitly affirmed the constitutionality of KRS 405.021. On June 4, 1992, the Supreme Court denied Stewart and Anne's Petition for Rehearing without additional discussion.

Jessica has resisted going with W.R. at the appointed times. Nevertheless, the Boyle Circuit Court has threatened Stewart and Anne with contempt of court if they do not hand over the

little girl to W. R. The Kings are presently complying with the Court's command.

REASONS FOR GRANTING THE WRIT

I. Introduction

Under the authority of a state law, a Kentucky court has ordered Stewart and Anne King, the happily married natural parents of then one and one-half-year old Jessica King, to surrender their child twice a week to Stewart's father for visitation. There is no suggestion that Stewart and Anne are unsuitable parents for Jessica. Nonetheless, the state now compels them to disregard their little girl's pleas and protests, as well as their own good judgment as to the child's best interests, and to deliver Jessica into the custody of others at specified times. Stewart and Anne petition this Court to strike down KRS 405.021, the Kentucky statute which has deprived them of the liberty to conduct their family life as they deem best, and to reverse the actions of the Kentucky courts which have violated their right to raise their child as they see fit.

II. The History of Constitutionally Protected Parental Liberty

The Kings draw upon a lengthy history of judicial protection of parental rights in the area of bringing up children. This Court has long recognized that the liberty protected by the Fourteenth Amendment includes within its scope a wide sphere of conduct related to the life of the family and the bringing up of children. In 1923, the Court stated:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the

> individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, **establish a home and bring up children,** to worship God according to the dictates of his own conscience, and, generally, **to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.** Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).

Accordingly, the Court in Meyer struck down a state statute which forbade the teaching of the German language to persons who had not completed the eighth grade.

The "liberty of parents to direct the upbringing and education of children under their control" was reaffirmed in the 1925 case of Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In setting aside a state statute which required all children between the ages of eight and sixteen to attend public schools, the Court declared that, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. In the sixty-plus years since they were handed down, the rationale of the Meyer and Pierce decisions has become an integral part of the American constitutional and social fabric.

Although the scope of the liberty included within the Fourteenth Amendment was narrowed with the demise of economic or substantive due process which began in the late 1930's, constitutional protection of parental rights in matters related to establishing a home and bringing up children has endured. In 1944, the Court stated that, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). It was thus made clear that any judicial retreat from substantive due process as it had been known did not include the area of familial liberty.

Jealous judicial protection of parental liberty in bringing up

children has continued into this era. This Court has stated that, "[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" Stanley v. Illinois, 405 U.S 645, 651 (1972) citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Based on the long line of consistent supporting decisions, the right of parents to be free of governmental interference in the raising of children was rightfully characterized as "fundamental" in Santosky v. Kramer, 455 U.S. 745, 753 (1982).

As was stated in the 1977 decision in Moore v. East Cleveland 431 U.S. 494, 499 (1977):

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974). A host of cases, tracing their lineage to Meyer v. Nebraska (citation omitted) and Pierce v. Society of Sisters (citation omitted), **have consistently acknowledged a "private realm of family life which the state cannot enter."** (citations omitted) (emphasis added).

This Court is now called on to once again give life to the constitutional protection of this important private realm and preserve the basic values underlying our society which it represents.

III. The Importance of this Case

This case is important because the Court is asked to define the boundaries of the long-recognized liberty of parents in the area of raising children. If the statute in question is found to promote a compelling state interest which justifies the abridgment of the parents' acknowledged liberty interest, it is difficult

to see where the limit of state intrusion into the life of the family can be drawn. Once it is found that a state may take children from their parents in order to foster relationships with grandparents, the same rationale will support compulsory, state-ordered visitation by other relatives and perhaps even non-relatives. The dangerous potential of Kentucky's statute to undermine the American cultural tradition of parental sovereignty over children is therefore apparent.

Justice Joseph Lambert eloquently summarized the situation in his dissent from the decision of the Kentucky Supreme Court. Said Justice Lambert:

> It could not be disputed that the lives of most children could be theoretically improved by placing them with a more loving, attentive, and affluent family. None would seriously argue, however, that the state possesses the power to redistribute the infant population in such a manner simply because of its perception that a child would be better off somewhere else. Before the state should be permitted to intervene in the relationship between parent and child, there must be a determination that the care of the child fails to satisfy minimum standards. King v. King, 828 S.W.2d 630, 634 (Ky. 1992) (Lambert, J., disserting).

There has been no such determination in this case.

Stewart and Anne King obviously cannot exercise the "companionship, care, custody and management" of their little girl, which this Court has recognized as vitally important, when the power of the state has placed the child under the custody and control of someone else. This statute is radically different than one requiring compulsory education, for example. Though the state can compel some type of schooling, the Kings at least have the right to choose the school their daughter will attend or to teach her at home. In this case, the Kings are deprived of all input over the things their child will do, the values and practices to which she will be exposed, and the way her needs will be

addressed when she is with her grandfather. No adequate justification can be provided for a law which tears a small child away from her loving and fit natural parents and vests control of the child in persons the parents have deemed undesirable.

The scope of the liberty protected by the Fourteenth Amendment has been an issue of considerable debate and difficulty throughout the history of American constitutional interpretation. The inclusion of parental rights to raise children free from governmental interference, however, has been a constant in this otherwise uncertain area. In addition to the substantial jurisprudential authority which has long supported this right, the liberty of parents to control the upbringing of their children is deeply imbedded in the cultural heritage of America. The Kings' case cries out for Supreme Court reaffirmation of this vitally important principle.

CONCLUSION

In most instances, grandparents can provide an especially meaningful type of positive support to their children and grandchildren. Sadly, in some cases this is not true. The responsibility for determining what role a grandparent should be permitted to play in the life of a grandchild must, therefore, rest with the parents. The state is ill-equipped to enter this realm and, even if the state were well-suited to such a task, the societal consequences of governmental intrusion in this area are undesirable. If Kentucky is permitted to wrest children from their parents, as has been done here, it is difficult to see where the line restricting state intervention in the family will be drawn. Accordingly, this Court should grant the Petition of Stewart and Anne King and take all action necessary to vindicate the rights and liberty of the

parents of Jessica King.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF KENTUCKY

90-SC-495-DG
90-SC-502-DG

W. R. KING MOVANT

ON REVIEW FROM THE COURT OF APPEALS
V. NO. 89-CA-000207
(Boyle Circuit Court No. 88-CI-000282)

STEWART KING and ANN KING RESPONDENTS

OPINION OF THE COURT BY
SPECIAL JUSTICE JAMES H. LUCAS

REVERSING

The respondents, Stewart and Ann King, are husband and wife and are the parents of one child; a daughter, Jessica, born April 24, 1987. The movant, W. R. King, is Stewart's father and Jessica's paternal grandfather.

Until August of 1988, Stewart and his family lived in a house located upon Mr. King's farm which he had built for them. Stewart was employed full time by the R. R. Donnelly Company in Danville, Kentucky, and also worked on the family farm. The home was provided rent-free and, in addition, Stewart received approximately $2,800 per year from the farm's tobacco crop. Mr. King did not feel that Stewart was putting in enough hours on the farm and, subsequently, ordered him to move out of the house, which he and his family did. To summarize the testimony of the witnesses, Mr. King thought his son drank too much and did not do enough work, and Stewart and his wife thought his father was overbearing and intrusive.

While Stewart and his family were living on the farm, Mr. King had almost daily contact with Jessica for a period of some 16 months. After Stewart and his family were asked to leave, Mr. King requested that he be allowed to see Jessica. This request was denied by Stewart and his wife. Mr. King's attorney then wrote a letter to the younger Kings, again requesting visitation with the granddaughter, but again the request was denied.

Mr. King then filed a petition for visitation in the Boyle Circuit Court to which Stewart and Ann responded, generally denying the allegations of the petition and challenging the constitutionality of KRS 405.021. The attorney general declined to intervene. A hearing was held on November 16, 1988, at which time the court referred all of the parties, including Jessica, to the Comprehensive Care Center in Danville, Kentucky, for evaluation, mediation and recommendation. After receiving the report of the Comprehensive Care Center, the court granted visitation by the grandfather with Jessica from 4 p.m. to 6 p.m. each Wednesday and Saturday. The respondents timely filed a motion to alter, amend or vacate, at which time a second hearing was held and the court heard further testimony from the respondents. On January 6, 1989, the court entered its finding of facts, conclusions of law and judgment, upholding the constitutionality of KRS 405.021 and finding that the best interest of the infant child, Jessica, would be served if her grandfather was granted visitation rights.

The respondents then appealed this matter to the Court of Appeals which did not reach the constitutional issue, but reversed the decision of the Boyle Circuit Court on the issue of the best interest of the child. Discretionary review was then granted by this Court.

Two issues are presented on appeal: first, the constitutionality of KRS 405.021; and second, if the statute is constitutional, did the trial court err in finding that the best interest of the child would be served by allowing the grandfather the right of visitation.

KRS 405.021 provides as follows:

> REASONABLE VISITATION RIGHTS TO GRANDPARENTS.
> (1) The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
>
> (2) The action shall be brought in Circuit Court in the county in which the child resides.

Counsel for the respondents vigorously argues that the statute in question constitutes an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit. While not being all-inclusive, the Supreme Court of the United States in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), attempted to define the liberty interest protected by the Fourteenth Amendment of the Constitution of the United States as follows:

> Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Id. at 399

While the Constitution, as interpreted by the various courts, does recognize the right to rear children without undue governmental interference, that right is not inviolate. Parents are required by law to see that their children are educated. Children must be inoculated against disease. Parents cannot abuse their

children. Severe restrictions are placed upon the employment of children. Children must be restrained when riding in a motor vehicle. Thus, over the years, there has been increased legislation guaranteeing the safety, education, and the physical and emotional welfare of children. Under ordinary circumstance, few would dispute that there are benefits to be derived from the establishment of a bond between grandparent and grandchild. While it may be desirable for aunts and uncles and cousins to have a close relationship with each other, our General Assembly has seen fit to protect visitation only by grandparents, and then only if it can be demonstrated to be in the best interest of the child. Our courts have strictly interpreted this provision. The Court of Appeals refused to extend the right to great-grandparents in Cole v. Thomas, Ky. App., 735 S.W.2d 333 (1987), and this Court in the Hicks v. Enlow, Ky., 764 S.W.2d 68 (1989), denied visitation by grandparents if the child had been adopted and when the parental rights of one of the parents had been terminated.

In an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds. As this Court observed in Hicks, supra, "the grandparents" visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society." Id. at 70 and 71. There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals. One of the main purposes of the statute is to prevent a family quarrel of little significance to disrupt a relationship which should be encouraged rather than destroyed.

As noted in Meyer, supra, "The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within

the competence of the state to effect." Id. at 400. However, it is not unreasonable for the state to say that the development of a loving relationship between family members is desirable and the arbitrariness of the statute is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interest of the child.

"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." Id. at 401. This statute seeks to balance the fundamental rights of the parents, grandparents and the child.

At common law, grandparents had no legal right to visitation, Jauett v. Rhorer, Ky., 339 S.W.2d 865, 868 (1960). However, the General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents. Thus, we find that KRS 405.021 is constitutional.

Central to our finding is the protection afforded the child, the parents and the grandparents. If the statute gave the grandparents the unrestricted right of visitation, there would be much less reluctance to declare it unconstitutional. But visitation cannot be granted until an action is filed in Circuit Court, a hearing conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation. Fortunately, it is not a common occurrence for this statute to be called into play, but when it is, the parties are afforded ample

protection to preclude either injustice or an unwarranted intrusion into the fundamental liberty of the parents and child.

In the instant case, there were two hearings and a psychological evaluation of all the parties before the trial court entered its decree. Jessica's father testified that he had no qualms about his father's ability to love and care for the child. The condition and safety of Mr. King's home was never in issue as Jessica had been left there many times and there appeared to be no question that she would receive proper care during periods of visitation. There appears to be no valid reason that a trivial disagreement between a father and son should be allowed to deprive a grandparent and grandchild from developing the natural affinity so common between these family members.

For the reasons herein stated, the decision of the Court of Appeals is reversed and the order of the Boyle Circuit Court is reinstated.

Stephens, C.J., Combs, Leibson, and Spain, JJ., concur. Lambert, J., dissents with a separate opinion in which Wintersheimer, J., joins. Wintersheimer, J, dissents with a separate opinion in which Lambert, J., joins.

SUPREME COURT OF KENTUCKY

90-SC-495-DG
90-SC-502-DG

W. R. KING — MOVANT

ON REVIEW FROM COURT OF APPEALS
V. NO. 89-CA-000207
(Boyle Circuit Court No. 80-CI-000282)

STEWART KING and ANN KING — RESPONDENTS

DISSENTING OPINION BY JUSTICE LAMBERT

The issue here is not as the majority presents it. The issue is not whether visitation with a grandparent is desirable and in the best interest of the grandchild. Rather, the issue is whether the state, by enactment of a statute which has as its only standard the subjective requirement of "best interest," may invade an intact nuclear family and require that family to deliver its minor child to another person for visitation. The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild, regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right.

The statement of facts in the majority opinion is not entirely unbalanced, but it omits several facts important to an understanding of the case. As found by the trial court, movant places

great demands on his son, Stewart King, respondent herein, to work on movant's farm in exchange for free rent and a portion of the crop proceeds. Respondent's farm work was in addition to a full-time factory job and when he did not perform as his father expected, he was ordered to move from the premises. Moreover, the evidence is clear that movant is an overbearing individual who intruded with impunity upon respondent's family life demonstrating total indifference to their wishes. Finally, the majority fails to mention that movant openly cohabits with Emarine Cash, a woman to whom he is not married, and that the trial court granted Emarine Cash, a woman with no marriage or blood kinship to the infant child, a right to pick up the child for visitation.

There is no doubt that parents have an "essential" liberty interest, free of state interference, in the rearing of their children. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed.2d 1042 (1923). Such interest has been described as "basic civil rights of man" (Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942)) and "far more precious than property rights" (May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed.2d 1221 (1953)). In Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion), the Court acknowledged an extreme limitation on governmental intrusion into family affairs.

> "[W]hen the government intrudes on choices concerning family living arrangements, the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."

The right of parents to control the upbringing of their children was expressly recognized in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.2d 1070 (1925):

> "[W]e think it entirely plain the [statute] unreasonably interferes with the liberty of parents and guardians to

direct the upbringing and education of children under their control . . . ."

In a far-reaching decision, Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Court held that the legitimate state interest in promoting secondary education was insufficient to overcome the wishes of the parents to the contrary. While the Court's decision in Yoder was based in part in First Amendment grounds the Court noted that such education was

> "in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with the beliefs." Yoder, supra.

Relying on Pierce v. Society of Sisters, supra, the Court said:

> "[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." Yoder, supra.

The right to family autonomy which had been recognized in various earlier decisions was flatly declared an express right in Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In determining what standard of proof was necessary in termination of parental rights cases, the Court forcefully reiterated its view as to the rights of parents in their child:

> "The absence of dispute [that parents have a due process right in termination cases] reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. (Citations omitted.) The fundamental liberty interest of natural parents in the care, custody, and manage-

ment of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." 455 U.S. at 753.

The foregoing cases fully demonstrate that parents have a fundamental liberty interest in maintaining an autonomous family unit except in limited circumstances, some of which are identified in the majority opinion, in which the state has been determined to have a compelling interest. There is no doubt that court-ordered visitation with a minor child by one outside the nuclear family amounts to an invasion of family autonomy. The question thus becomes what is the compelling state interest in requiring visitation between a grandchild and grandparent when the nuclear family in intact and functioning in a satisfactory manner.

The majority opinion and the state seem to rely on the idea, in addition to the erroneous belief of a fundamental right in the grandparent, that the lives of the grandchild and grandparent are enriched by their association. While such may be true in many cases, while in others it is not, mere improvement in quality of life is not a compelling state interest and is sufficient to justify invasion of constitutional rights. So long as a family satisfies certain minimum standards with respect to the care of its children, the state has no interest in attempting to "make things better."

It could not be disputed that the lives of most children could be theoretically improved by placing them with a more loving, attentive, and affluent family. None would seriously argue, however, that the state possesses the power to redistribute the infant population in such a manner simply because of its perception that a child would be better off somewhere else. Before the state should be permitted to intervene in the relationship between parent and child, there must be a determination that the care of the child fails to satisfy minimum standards.

Recent Kentucky authority has recognized the

> "fundamental, basic and constitutionally protected rights [parents have] to raise their own children and that any attack by third persons (and this would include grandparents in that category) seeking to abrogate that right must show unfitness by 'clear and convincing evidence.'" Davis v. Collinsworth, Ky., 771 S.W.2d 329 (1989).

In Davis, the litigation was between a paternal grandmother and the natural mother. The trial court found the mother to be unfit and determined that the best interest of the child was to place custody with the grandmother. The Court of Appeals and this Court reversed relying on Santosky, supra, Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and McNames v. Corum, Ky., 683 S.W.2d 246 (1985). We reiterated the rule that a finding of unfitness must be by clear and convincing proof and described factors which showed unfitness and that poverty alone was an insufficient basis to deprive the mother of custody. Thus, we recognized that a showing of general improvement of the child's life is insufficient to deprive the natural parent of custody. We required a showing of harm to the child by virtue of parental unfitness. There is no reason a similar rule should not be applied in an action for grandparent visitation. Absent a showing of harm to the child, there is no compelling state interest in intervention into the affairs of an autonomous family and any statute which authorizes such intervention violates the parents' liberty interest under the Fourteenth Amendment.

In its opinion, the majority omits the foregoing essential step in the analysis. Rather than focus on the child for possible harm, it makes the per se assumption that deprivation of access to the grandparent is harm. There is no authority for this proposition and it is otherwise illogical.

While court-ordered visitation is an invasion of family autonomy, one may ask why not balance the interests of the parties and require the parents to suffer minor denigration of their rights in favor of the benefits presumed from association

between the grandchild and grandparent. The answer to this question is eloquently stated in Bean, Grandparent Visitation: Can the Parent Refuse?, 24 U. Lou. J. Fam. L. 393 (1985), as follows:

> "Some parents and judges will not care if children are physically disciplined by the grandparents; some parents and judges will not care if the grandparents teach children a religion inconsistent with the parents' religion; some judges and parents will not care if the children are exposed to or taught racist beliefs or sexist beliefs; But some parents and some judges will care. Between the two, the parents should be the ones to choose not to expose their children to certain people or ideas, and without a showing that this deprivation has harmed the child in some way beyond a per se disassociation with the grandparents, the family's private decision making should not be tried in a court of equity. Instead, the grandparents' request and justification for visitation should be subject to scrutiny and should be proved necessary to the welfare of the child."

A final point should be made. In 1984, the Legislature authorized courts to grant visitation rights to grandparents. While many children undoubtedly have a close familial bond with their grandparents, other children have close bonds with adult siblings, aunts and uncles, cousins, step-parents and step-grandparents, and neighbors. If the grandparent visitation statute passes constitutional muster, there is no reason to believe a similar statute could not be enacted for benefit of a host of other relatives or even family friends. Under the majority opinion, there is no reason to doubt the constitutionality of a statute, if one should be enacted, which gave standing to virtually any person

who claimed to be devoted to the child; and upon a court determination of best interest, allow that person visitation rights regardless of the parents' wishes. Manifestly, such a statute would result in chaos for parents as they attempt to rear their children.

For the foregoing reasons, I dissent.

Wintersheimer, J., joins in this dissenting opinion.

SUPREME COURT OF KENTUCKY

90-SC-495-DG
90-SC-502-DG

W. R. KING — APPELLANT

V.

ON REVIEW FROM THE COURT OF APPEALS
NO. 89-CA-207
(BOYLE CIRCUIT COURT NO. 88-CI-282)

STEWART KING and ANN KING — APPELLEES

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because the trial court was clearly erroneous in finding that the grandfather met his burden of proof. The grandfather failed to prove that forced visitation was in the best interests of the infant child. The majority opinion has misapplied the standard of review and misinterpreted the law.

I agree with the Court of Appeals that it is unnecessary to reach the constitutional questions in this case because the grandfather has failed to meet his burden of proof. The grandfather has produced no evidence that it is in the best interests of the child to require grandparent visitation upon a nonconsenting parent living in an intact family.

This is a particularly fact-intensive case. An examination of the record indicates that the circuit court conducted two separate hearings on the question and ordered the parties and the 19 month old child to undergo a series of evaluations by the comprehensive care center as to the best interests of the infant child and its relation to the parties involved. The grandfather

produced no evidence that it was in the best interest of the child to have forced visitation with her grandfather. His testimony does not touch the question of the child's best interests. The only other possibly relevant document in the record is a report by a "certified psychologist with autonomous functioning" which recommends a two-hour visitation period per week. This report does not satisfy the legal burden of proving the best interests of the child. It admitted that the likelihood of preservation of an emotional relationship between the child and the grandfather was based on an assumption and the recommendation was a mere average of the position of the parties not one based on the child's best interests. The evaluator made no mention how the child's best interests would be promoted by visitation with the grandfather.

The trial judge stated in part that there is no allegation that it is not in the best interests of the child that she know the grandfather. Clearly this is a double negative and a rather bizarre twist to the standard of proof which is placed on the natural parents. Such a finding is clearly erroneous because the statute requires an affirmative finding that visitation would be in the best interests of the child. Cf. CR 52.01.

The burden of proof is on the grandfather. The majority opinion also seems to be enunciating a negative standard insofar as there was no question about proper care during the visitation. That is not the issue. The issue is the burden of proof.

The parents are in the best position to know and determine what serves the best interests of their child, and such determination must be given great weight. The grandfather must overcome the initial responsibility of the parent in order to question the decision of the natural parents.

The authorities cited by the majority and the grandfather in regard to the enforcement of K.R.S. 405.021 are based on a totally different fact pattern than that now before this Court. Visitation ordered by a court over the objection of the natural parent in an intact family can be nothing other than forced by the state.

At common law, grandparents did not have the legal right to

visit a grandchild over the objection of the parent. American courts followed this rule until the 1960's when states began to grant grandparent visitation rights under certain limited circumstances. All fifty states now have some kind of grandparent visitation statute.

The real issue here is to what extent the statutorily created right of grandparent visitation will be permitted to override the fundamental natural inherent constitutional right of parents in an intact family unit.

It is fundamental that parents are entitled to raise their children in a proper home environment without any interference by the state or other third party. Governmental intervention can be justified only when there is a clear and definite showing that the parental decision would result in harm to the child or otherwise impinge on the child's best interests.

The basis of state intervention has always been some kind of harm to the child and the United States Supreme Court has frequently recognized family autonomy as being entitled to constitutional protection. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Ginsburg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

Historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children. "The Constitutional Constraints on Grandparents' Visitation Statutes", 86 Columbia Law Review 118 (1986), Judith L. Shandling.

Any interference upon the fundamental right of the parents must pass the constitutional test of harm to the child to support a compelling governmental interest which would permit such interference. See 16A C.J.S., Constitutional Law §464(a).

K.R.S. 405.021 gives broad range to the right of grandparents to visit. It is up to the judicial branch of government to safeguard the fundamental constitutional rights of an intact

family to unwanted interference from either the grandparents or the state.

In commenting on the Tennessee statute which is very similar to Kentucky's, Sharon F. Ladd "Notes", 15 Memphis State Law Review 635 (1985) wrote, "If the natural parents have a viable marriage, it is not wise to allow parents of either parent to bring suit as this could have a devastating effect on the marriage and therefore the child."

Similar concerns relative to the authority of parents in an intact family to prevent undue interference can be found in Theodore R. v. Loretta A.J., 476 N.Y.2d 720 (1984); Towne v. Cole, 478 N.E.2d 895, 133 Ill. App. 3d 380 (Ill. App. 1985); In re Meek, 443 N.E.2d 890 (Ind.App. 1983); McCarty v. McCarty, 559 So.2d 517 (La. App. 2d Cir. 1990); Thompson v. Vanaman, 515 A.2d 1254, 212 N.J. Super. 596 (N.J. Super. A.D. 1986); Herron v. Seizak, 468 A.2d 803 (Pa. Super. 1983).

The problems incident to a broad statute such as Kentucky's have been recognized by Kathyleen S. Bean "Grandparent Visitation: Can the Parent Refuse" 24 Journal of Family Law 393 (1985-86).

In an appeal from a county court, the Delaware Family Appellate Court gave an extended and careful analysis to the arguments of grandparents in Ward v. Ward, 537 A.2d 1063 (Del. Family Court 1987) which observed in part that the interests of grandparents may be limited when they conflict with the interests of the child's parents. The Delaware Family Court has authority to rule on constitutional questions in that state.

Wisconsin in Van Cleve v. Hemminger, 415 N.W.2d 571 (Wisc.App. 1987) stated that in the absence of a dissolving family relationship there is no justifiable reason for the state to override determinations made by the parents as to what is in the best interests of their children.

Section 2 of the Kentucky Constitution prohibits the "absolute and arbitrary power" over the lives ... of free men ...." Here the parents have a significant liberty interest in the right to raise their daughter free of interference by the state or any other person in the absence of harm to the child. There is no evidence

of any governmental interest that needs to be protected in this specific situation.

Here K.R.S. 405.021 is unconstitutional in its application to the right of the parents to raise their child when there has been no demonstration that the child's best interests will be harmed by the decision of the parents. Cf. Saylor v. Hall, Ky., 497 S.W.2d 218 (1973); Pierce, supra.

The Court of Appeals was correct in its decision. Parents in an intact family situation have an inherent constitutional right to raise their child free from interference from any third party, including the state. The integrity, privacy and sanctity of the American family must be jealously protected. The majority decision is a radical extension of the existing statute and as such results in an impermissible interference in the family unit. The parents and their child have been deprived of their right of privacy; the right to be left alone by the state or any third party.

It is unfortunate that the parents and grandparent cannot function as a harmonious extended family unit. Certainly, it is the responsibility of parents to promote and strengthen association between grandchildren and grandparents. However, in certain situations this cannot be achieved and the immediate intact family unit must take priority over the extended family unit. In reaching such decisions, the courts must recognize the best interests of the child standard and apply it reasonably to the specific situation.

I am not unmindful of the need of a right for grandparent visitation in a fragmented family, but no governmental authority or state may use the law to force grandparent visitation on nonconsenting parents living in an intact family unit. Clearly there are situations where the family is deteriorating that need attention. This is not such a situation. This is clearly governmental interference.

I would affirm the decision of the Court of Appeals.

Lambert, J., joins in this dissent.

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 89-CA-000207-MR

STEWART KING AND
ANNE KING — APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER,
JUDGE ACTION
NO. 88-CI-282

W. R. KING — APPELLEE

REVERSING AND REMANDING WITH DIRECTIONS

* * * * * * *

BEFORE: HOWERTON, Chief Judge, DYCHE and REYNOLDS, Judges.

DYCHE, JUDGE. Appellant Stewart King and his wife Anne, the other appellant, lived in a house on the farm owned by appellee W. R. King, Stewart's father. Along with appellants lived Jessica, their infant daughter, who had a significant and caring relationship with W. R. since her birth; she spent a good amount of time with her grandfather, and he demonstrated the traditional affection for her.

Stewart was employed full time at a local factory, but in addition to this employment, he worked an additional 20-30 hours per week on the farm. As compensation for the farm work,

Stewart, Anne and Jessica were allowed to live in W.R.'s extra house rent-free, and Stewart received a portion of the proceeds from the sale of the tobacco crop each year.

In August of 1988 W.R. became dissatisfied with the amount of time Stewart was able to contribute to farm work; a dispute ensued, resulting in W.R. ordering Stewart and his wife and child off the farm. Following their departure, a request was made by W.R. for visitation with Jessica. Both this personal request and a formal request were made through counsel for W.R. and were denied.

An action was filed on W.R.'s behalf in the Boyle Circuit Court seeking court-ordered visitation pursuant to KRS 405.021. That statute, in its entirety, reads as follows:

> Reasonable visitation rights to grandparents.
> (1) The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
> (2) The action shall be brought in circuit court in the county in which the child resides.

The circuit court conducted two separate hearings on this issue, and ordered that the parties hereto and Jessica (age 19 months at the time of the first hearing and 21 months at the time the final order was entered) undergo "a process of evaluation, mediation and recommendation by the Comprehensive Care Center as to the best interest of the infant child as it involves these parties." At each stage of these proceedings, the trial court urged and cajoled the parties to settle their differences, clearly exasperated at the impasse and its effect upon all concerned.

A final order was entered on January 9, 1989 which granted visitation to appellee twice a week, for three hours each visit. Stewart and Anne now appeal, raising four grounds for reversal.

The first two arguments of appellants raise the issue of the constitutionality of KRS 405.021; the third argument contests

the policy decision of the General Assembly in establishing the "best interests" standard in this statute. That third ground is beyond the jurisdiction of any court. Kentucky Constitution §§ 27-29. And, as we decide the case on the issues, it is unnecessary to reach the constitutional challenges.

Simply put, appellee produced no evidence whatsoever that it is in the child's best interest to have forced visitation with her grandfather. The transcripts of the two hearings in this case, combined, amount to seventy-one pages; the testimony of appellee, his only witness, is less than seventeen pages. Nowhere in his testimony does he address the child's best interests.

The only other significant item in the record is a report by a "Certified Psychologist with Autonomous Functioning." That report recommends, as a result of interviews with all four concerned parties, two two-hour visitation periods per week. This document, standing alone, does not satisfy the legal burden of proving best interests of the child.

The order of the Boyle Circuit Court is reversed, and this case is remanded with directions for the trial court to dismiss the petition.

ALL CONCUR.

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
BOYLE CIRCUIT COURT
CIVIL ACTION NO. 88-CI-282

W. R. KING, PETITIONER,

VS. ORDER

STEWART KING, ET UX, RESPONDENTS.

This cause came on for hearing before the court on November 15, 1988. The petitioner was present and represented by counsel and the respondents were also present and represented by counsel. The court heard testimony.

The facts in this case are basically uncontested. The petitioner (W. R.) is the father of the respondent Stewart King (Stewart) and the father-in-law of Anne King (Anne). Stewart and Anne are the parents of an 18 month old daughter, Jessica King. Until approximately September 15, 1988, W. R. had contact at least every other day with the infant child Jessica and sometimes more often. W. R. has often acted as baby-sitter along with his significant other Emarine.

At the time Jessica was born, Stewart and Anne lived in an apartment over the Minit Mart on Lexington Avenue. Sometime thereafter they moved to a house located on a farm owned by W. R.

Stewart works three 12 hour shifts at Donnelley and then is off for 3 days then works four 12 hour shifts and is off for 4 days. On his days off we worked on the farms owned by W. R. in trade for free rent and a portion of the tobacco crop proceeds. W. R. expected a great deal of Stewart in his participation in the farm operation.

W. R. felt Stewart did not do enough in the farm operation. Stewart believes W. R. so interfered with his life as to negatively impact on his marriage. He resented demands made by W. R.

that precluded him from participating fully in the parenting of Jessica as well as in his marriage to Anne. Hard feelings on both sides resulted.

Approximately September 15, 1988, W. R. told Stewart to pack his bags and move off the farm. Stewart did that immediately. W. R. called Stewart and Anne one time to request visitation with Jessica and was denied that visitation. Thereafter, W. R. caused a letter from his attorney, James F. Clay, Jr., to be sent to Stewart and Anne demanding visitation with the infant child or a lawsuit would follow. No response followed that letter and this suit was filed.

All parties admit that W. R. loves the child and is able to care for her. Stewart believes W. R. may be a negative influence on the child as he may attempt to turn the child against her parents by negative comments made about them.

CONCLUSIONS OF LAW

The respondents have raised issues of the constitutionality of KRS 405.021. Similar statutes in other states have been universally upheld as constitutional. The respondent's motion to dismiss as the statute as unconstitutional is DENIED.

The issue remaining under KRS 405.021 is a determination by the court of the best interest of the infant child. It is uncontested that for approximately 16 months of the 18 months of this child's life, W. R. was actively involved in her life with the consent of Stewart and Anne. That relationship has been summarily terminated by Stewart and Anne precluding visitation due to their feeling W. R. is to involved in their lives and attempts to dictate their lives as opposed to letting them make their own life decisions.

WHEREFORE, IT IS HEREBY ORDERED:

1. The parties hereto and the infant child Jessica shall, within ten (10) days of the date of the hearing begin a process of evaluation, mediation and recommendation by the Comprehen-

sive Care Center as to the best interest of the infant child as it involves these parties. This is to include psychological evaluations and plan of long term counseling if deemed necessary.

2. The cost of this evaluation, mediation and recommendation shall be paid by the Petitioner in full on demand subject to the court's future orders concerning division costs between the parties.

3. The court reserves ruling on the request of the petitioner for visitation pending the final determination of the court. Such order may be entered after the evaluation process has begun if so recommended by the Comprehensive Care Center. The court also may consider visitation upon request by the petitioner after evaluation process begins.

Given under my hand this 18 day of November, 1988.

/s/Stephen M. Shewmaker

Circuit Judge
COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
BOYLE CIRCUIT COURT
NO. 88-CI-282

W. R. KING, PETITIONER

vs. **ORDER**

STEWART KING, ET AL. RESPONDENTS

The court having reviewed the report and recommendation of the Comprehensive Care Center dated December 6, 1988, and being advised, hereby

ORDERS that the petitioner have visitation with Jessica King weekly on Wednesdays from 4:00 P.M. to 6:00 P.M., and Saturdays from 4:00 P.M. to 6:00 P.M., until further order of the court.

The petitioner shall pick up and deliver the child at the Bodner residence on Madison Avenue where the respondents are residing, and for such purpose, Emarine Cash may convey the child, and the respondents shall have the child ready for visitation and with such clothing or accessories as may reasonably be needed for her comfort during visitation, and the petitioner shall accommodate the child's normal medical, dietary, and rest regime.

Given under my hand this December 9, 1988.

/s/ Stephen M. Shewmaker
Circuit Judge

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
BOYLE CIRCUIT COURT
CIVIL ACTION NO. 88-CI-282

W. R. KING, PETITIONER,

VS.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

STEWART KING, ET UX, RESPONDENTS.

This cause came on for hearing upon motions by the respondents to alter, amend or vacate and to hear further testimony. The petitioner was present through counsel and the respondents were present and represented by counsel. The court heard testimony of Stewart King and Anne King.

The court makes the following Findings of Facts, Conclusions of Law and Order.

FINDINGS OF FACT

1. The court adopts the Findings of Fact in this court's order of November 18, 1988.

2. In addition thereto the parties were evaluated at the Comprehensive Care Center in Danville, Boyle County, Kentucky. It is apparent that there is no love lost between the petitioner (W. R.) and respondents (Stewart and Anne). It appears that the concerns of Stewart and Anne that W. R. is unduly impacting on their lives is the basis for their request to

deny W. R. visitation with the infant child. There is no allegation that the child is in danger when with W. R. There is no allegation that it is in not in the best interest of the child that she know W. R. All the respondents' allegations concern W. R.'s attempt to demand things of his son, Stewart, that precluded a normal home environment.

3. The court finds that W. R. King and his significant other, Emarine, have had visitation with the infant child pursuant to this court's previous order. They have failed to have the child in a car seat during visitation. Not only is it the law in Kentucky, but it is in the best interest of the infant child that the child be in a car seat at all times and places when traveling in an automobile.

4. It appears that the infant child of the parties is at the baby-sitters until 5:00 P.M. each week day. Anne has been taking off work early in order to pick up the child at the baby-sitters and to have the child at home for W. R.'s visitation. Anne loses pay for no reason. In the future during the visitation with the child, W. R. or Emarine, and no other shall be allowed to pick up the child at the baby-sitters when she is there and then return the child to the home of Stewart and Anne at the end of visitation. Visitation shall continue on Wednesday at 4:00 P.M. to 7:00 P.M. and Saturday's from 4:00 P.M. to 7:00 P.M.

5. It appears that Stewart King when at work at Donnelley & Company works a twelve-hour shift. He then sleeps approximately 10 hours. This visitation with the infant child takes away little if any time of Stewart and his visitation with his daughter. Anne also works and is usually home around 5:30 P.M. This visitation minimally impacts upon her time with the child.

CONCLUSIONS OF LAW

1. KRS Chapter 405 as it applies to grandparent visitation is constitutional.

2. It is in the best interest of the infant child that visitation with W. R. King be allowed by this court.

WHEREFORE, IT IS HEREBY ORDERED:

1. W. R. King shall have visitation with the infant child of the respondents on Wednesdays from 4:00 P.M. to 7:00 P.M. and on Saturdays from 4:00 P.M. to 7:00 P.M. If the child is at the babysitter either W. R. King or Emarine Cash may pick up the child.

2. At all times when the child is with Emarine Cash or W. R. King in a vehicle the child shall be in a car seat. Mr. King shall purchase a car seat prior to the exercise of his next visitation. The seat shall be approved by Anne King or Stewart King prior to purchase. If at any time the infant child is not in her car seat when travelling in any form of transportation with W. R. King or Emarine Cash, Anne or Stewart may immediately and forthwith remove the child from Emarine Cash or W. R. King. Further if proof by the preponderance of the evidence indicates that Emarine Cash or W. R. King allows the child to travel in any form of transportation while not being in a car seat the court may eliminate or terminate this visitation.

3. Petitioner shall pay the costs of this action including his own attorneys fees and the respondents shall pay their attorneys fees.

4. Petitioner, Emarine Cash, and respondents shall begin and complete counselling to deal with the unresolved issues of W. R. King's previous interference in respondents lives. The parties shall address and deal with all other issues that may arise during this counselling. The cost shall be paid by petitioner. The parties shall agree on a counsellor within ten (10) days. If they cannot agree the court shall make the choice for them.

5. Pursuant to CR 54.02(l), as amended, and any and all other applicable law, the foregoing order is FINAL; adjudicates all the rights and claims of all the parties thereto, and there is no Just reason for delay.

It is so ORDERED, ADJUDGED, and DECREED this 6 day of January, 1989.

/s/Stephen M. Shewmaker
Circuit Judge

SUPREME COURT OF KENTUCKY
90-SC-495-DG
90-SC-502-DG

W.R. KING, MOVANT,

ON APPEAL FROM COURT OF APPEALS
89-CA-207
V. BOYLE CIRCUIT COURT
88-CI-282

STEWART KING and
ANNE KING, RESPONDENTS.

ORDER DENYING PETITION FOR REHEARING

This petition for rehearing by the respondents, Stewart King and Anne King, of the Court's opinion rendered March 12, 1992, is denied.

ENTERED: June 4, 1992.

/s/ Robert F. Stephens,
Chief Justice

(2)

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

No. 92-381

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STEWART KING and
ANNE KING, - - - - - - - - Petitioners

versus

W. R. KING, - - - - - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT, AND APPENDIX

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No. 92-381

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STEWART KING and
ANNE KING - - - - - - - - - - *Petitioners*

v.

W. R. KING, - - - - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT, AND APPENDIX

May it please the Court:

COUNTERSTATEMENT OF THE CASE

Summary of Facts

Respondent accepts the statement of facts by the Kentucky Supreme Court. The petition claims no error based upon these uncontested facts.

For sixteen of her first eighteen months of life Jessica King spent time in her grandfather's house at least every other day and often daily. She ate, slept, and received care and nurture from him and his fiancee—now his wife—with the approval and gratitude of her parents, who moved into a new house he built for them on his farm shortly after she was born.

A dispute over the amount of work performed on the farm by Stewart King for his participation in the crop

proceeds and use of the house led to departure of Jessica and her parents to live elsewhere. Her grandfather's oral request and his counsel's written request for visitation with Jessica were refused, and he brought suit for visitation.

After a two-session evidentiary hearing and comprehensive evaluation of all parties by a court-appointed psychologist, the circuit court found visitation with her grandfather was in Jessica's best interests and granted it. Jessica's parents objected to visitation as an invasion of their rights but presented no history or prospect of danger to her. They said he might turn her against them.

For over a year, while petitioners pursued an appeal, visitation took place as decreed, twice weekly, without any request made to the trial or appellate court to alter or end it. The Kentucky Supreme Court upheld the visitation decree and these findings of fact, and rejected others urged by petitioners or mentioned by two dissenters and the intermediate appellate court. *King* v. *King*, 828 S.W.2d 630 (Ky. 1992).

Respondent believes the proof raises no factual issues material to certiorari even upon full briefing. The facts are uncontroverted, and others now argued were not raised below. Mindful of the obligation imposed by Rule 15.1, however, this response will examine some of the topics in the petition although the task is distasteful.

Clarification or Distinction of Other Facts

Moral Influence

One dissenting opinion castigated the majority for failing to mention that respondent openly cohabited with a woman to whom he was not married. In oral argument counsel for the parents had informed the court that the

couple was married. Now, in the parents' petition, counsel pardonably new to the case argues this arrangement was a basis for their objection to visitation. [Petition, p.3]

In fact Jessica spent her early months receiving care in her grandfather's home and her parents never objected to the arrangement or the fiancee then or later. The lack of objection is not surprising as petitioner Stewart King, as a minor in the custody of the respondent, lived in the same home with the same persons where Jessica was kept and now visits. No whisper of improper care, influence, or moral example came out in petitioners' proof or arguments to the state courts. This non-issue appears unsupported as well as inappropriately novel upon review.

The appellate court's essential holding (828 S.W.2d @ 632) on the scope of differences between the parents and the grandfather is succinct and accurate:

> "There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals. One of the main purposes of the statute is to prevent a family quarrel of little significance to disrupt a relationship which should be encouraged rather than destroyed."

Basis for Respondent's Views

Petitioners' recitation [Petition, p.3] that respondent "became upset when sickness . . . prevented Stewart from working" misses the mark, if it has any significance. The Kentucky Supreme Court accurately summarized the testimony (828 S.W.2d @ 630) that respondent "thought his son drank too much and did not do enough work," however no specific finding was made or requested on this subject and it appears beside the issue.

Proceedings and Activities Since Adjudication

Petitioners explain their plight following denial of rehearing by the Kentucky Supreme Court only in part. They omit description of at least ten occasions when respondent came to pick up Jessica, after petitioners had left town so as to deprive him, by design or coincidence, of at least two other scheduled visits. Respondent was met with performances staged and videotaped by her parents and maternal grandparents when he arrived to pick up the child.

They bought a video camera in order to film Jessica, now five years old, muttering repeatedly "I don't want to go, and that's final." One of them might read from the visitation decree and observe gratuitously how it doesn't provide she has to go against her will, or plead synthetically but publicly that surely her grandfather would not upset Jessica further by forcing her to accompany him.

They insist Jessica has forgotten her grandfather, but bring her for visitation with Jessica's paternal great grandparents, respondent's parents, who live in another new house he built for them next door to his, within two hundred feet and direct line of sight of each other, and a continuous yard. Jessica played there during visitation with respondent and with her great grandparents and has frequent and close contact with her maternal grandparents and paternal grandmother. Obviously petitioners do not intend to deny her intergenerational contact with anyone except the respondent.

Despairing of any outbreak of common sense or consideration for Jessica's interests, not to mention his own, respondent moved the circuit court to adjudge petitioners in contempt. A hearing was held on July 15, 1992.

The circuit court remained unimpressed with these dramatics and rejected the notion of Jessica having the decision to make or of her freely making the one she spoke. It ordered the parents to have Jessica delivered to petitioner's home for visitation but declined to martyrize them by using its contempt power, thus they are not 'threatened with contempt of court if they do not hand over the little girl.' (Petition, p. 4). [The trial judge gave a noteworthy illustration of restraint but implacable rejection of petitioners' tactics.] Jessica's maternal aunt volunteered to transport her, and the arrangement has worked since midsummer.

Since visitation resumed it has gone without a hitch. The close and loving relationship between Jessica and her grandfather has continued, without a suggestion of harm to her or her values in any form, and with a witness on the scene at the beginning of each visit in position to observe and report problems if any arose.

Characterization of the Visitation Ordered

Finally, the petition maintains from the first page to the last that the state trod upon the parents' sole prerogatives when it "ordered them to involuntarily surrender the child to the custody of a grandparent for periodic visitation." (Petition, p. i, Question Presented). They write "the state now compels them to disregard their little girl's pleas and protests, as well as their own good judgment as to the child's best interests." (Petition, p. 5). According to the parents, they "obviously cannot exercise the 'companionship, care, custody and management' of their little girl, . . . when the power of the state has placed the child under the custody and control of someone else." (Petition, p. 8). They complain they "are deprived of all input over the things

their child will do, the values and practices to which she will be exposed, and the way her needs will be addressed when she is with her grandfather." (Petition, pp. 8-9). They claim "the law which tears a small child away from her loving and fit natural parents and vests control of the child in persons the parents have deemed undesirable" is inadequately justified. (Petition, p. 9).

Respondent believes this court will have no trouble differentiating between a custody order and a visitation order for three hour periods, or observing in the temporary visitation order (Appendix to Petition, p. a25) that Jessica's grandfather "shall accommodate the child's normal medical, dietary, and rest regime," and from the final visitation order (Appendix to Petition, p. a27-a28) that when Jessica is in a vehicle during visitation she is to be in a car seat purchased by him and approved in advance by one of her parents.

The Kentucky Supreme Court wrote (828 S.W.2d @ 633):

> "Jessica's father testified that he had no qualms about his father's ability to love and care for the child. The condition and safety of Mr. King's home was never in issue as Jessica had been left there many times and there appeared to be no question that she would receive proper care during periods of visitation."

So these well meant but extensive exaggerations, unsupported by facts or rulings, have not been urged or accepted below. Specific instances of interference in parental control or complaints to the supervising trial court, by their absence, undermine these new arguments here.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary

This case presents no substantial federal constitutional issue of novelty, interpretation, or resolution of conflicting decisions.

All states have adopted grandparent visitation statutes. State courts and legislatures are protecting liberty interests vouchsafed by the due process clause and recognized in this court's decisions. The family issue is peculiarly within the states' competence, and they are dealing with it. Despite widespread application of differing statutes, and ample interpretative state court decisions, no statute has been found unconstitutional.

The argument that the parental liberty right is exclusive has no support in precedents recognizing that right, as those also recognize the rights of others and weigh all the rights. The petition seeks certiorari for reinterpretation or repeal of precedents, followed by the states as written, so as to avoid either recognizing other interests or weighing them along with the conceded liberty rights of the petitioners. It appears certain that either petitioners' claim of exclusiveness or those precedents must fall.

This case has limited and undisputed facts, with no threat to the child from visitation, but arises under the broadest form of statute, enacted by a minority of states, which allows visitation by grandparents after a hearing and finding that visitation is in the best interests of the child. No impairment of the intact nuclear family is a condition to granting visitation, since this statute does not require it.

A decision thus would be definitive only as to these parties and to like narrow cases. Accepting this case would

start, not finish, exceptions to these circumstances and interpretations of other laws by the states, produce rather than remove uncertainty, and start a parade of later petitions to this court. Just as a decision to reverse or restudy the issues would likely promote rather than resolve conflict, a decision to affirm would add little or nothing to the body of law upon the subject of grandparent visitation, liberty rights, or procedural due process.

This case was properly decided upon the facts and the law, and fully considered as to all issues raised here. Nothing in it, especially the shallow ire of Jessica's parents, cries out for relief; no great or threatening wrong has been done even if error was made; if it had been made the state courts are open and able to correct it, unless done by the passage of time itself.

Accordingly certiorari should be denied.

A. The Sole Issue Raised for Review Has Been Decided Against Petitioners' Position and No Reason to Alter or Abolish Precedent Is Urged

These petitioners assert a constitutional issue whether state-ordered visitation after a due process hearing impermissibly intrudes into their rights as parents. Parental rights to control children are not absolute, as these petitioners claim. Even when this court has held a state law crossed the line into arbitrary action violative of due process, it has recognized and weighed other interests, some constitutionally protected and some not. Examination of principal authorities cited by petitioners shows as much.

Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed.2d 1042 (1923), observed (p. 401) that in the case before it "the legislature has attempted materially to in-

terfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with power of parents to control the education of their own," and noted (p. 403): "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child." This case affords no basis for the narrow argument made now. It recognizes the parental rights are fundamental and protected by due process, but it also recognizes rights of others and conducts a balancing test among those rights.

Nothing quoted or contained in the opinion excludes, from the field of knowledge for children, information as to their ancestors, including that obtained by direct observation and contact. Such knowledge may be more precious, and no less injurious, than a foreign language learned at an early age.

In *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.2d 1070 (1925), the respondent schools asserted that others than the parents had rights to be protected; upon the basis of the liberty interest guaranteed by the Fourteenth Amendment, the court upheld injunctions in favor of the threatened schools, not parents. Petitioners' position finds no support in this case.

Prince v. *Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed.2d 645 (1944), one of the Jehovah's Witnesses cases, presented a parent's claim of a liberty right in bar to conviction under a child labor statute. Contrary to the petitioners' claim of the unrestricted right to regulate the upbringing of Jessica without interference or consideration

of interests outside their own as her parents, this precedent makes it clear that other interests must be considered, in at least these excerpts (pp. 165-167):

> "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.
>
> * * *
>
> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the state can neither supply nor hinder. *Pierce* v. *Society of Sisters, supra.* And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
>
> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [Citations omitted.]
>
> And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. [Footnotes omitted.] Its authority is not nullified merely because the par-

> ent grounds his claim to control the child's course of conduct on religion or conscience.***
>
> [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.
>
> * * *
>
> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."

Later due process cases now cited recognize constitutional concern and protection for the interests of children and the state as well as parents, and do not stand for the proposition that the parents' due process liberty rights as to children are always paramount, much less exclusive: *Stanley* v. *Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); (the remedy of a hearing removes the due process objection, and by extension such hearing in this case does the same; interests of others than the father were recognized and considered); *Wisconsin* v. *Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (Interests of state, parents and children must be weighed and considered together in evaluating statute requiring school attendance of children; all participating justices of the court adopted this balancing analysis of separate interests vouchsafed by due process, not just religious freedom); *Santosky* v. *Kramer,* 455 U.S. 745, 102 S.Ct. 1982, 71 L.Ed.2d 599 (1982) (due process-protected interests of state as parens patriae and of children are involved with those of parents in proceedings for termination of parental rights;

majority and dissenting opinions both recognize need for consideration of at least two if not all three interests at one or the other of a bifurcated proceeding).

It appears from these cases that petitioners claim under and against the same precedents simultaneously. By asserting their parental rights as absolute, exercisable in spite or disregard of due process rights in others, petitioners here present only a decision whether to interpret these precedents in a manner contrary to the plain terms and tests they employ, or to uproot them altogether.

Since they do not argue such an interpretation or annihilation, but instead rely upon these very precedents, the petitioners here leave the court nothing to decide: such logic is strangled by its own umbilical cord.

B. These Uncontroverted Facts Provide No Basis for Broad Review of the Issue of Grandparent Visitation.

In this case the wide issue, whether state ordered grandparent visitation per se offends the liberty right of objecting parents, appears in the most restrictive facts and the broadest scope of statute.

The sole reason for denial of visitation is the aftermath of a spat between the parents and the grandparents. No circumstances pose a threat to Jessica by visitation. With the approval and initiative of her parents she has known her grandfather, his wife, and their home and nurture.

The facts are too perfect and confined; they would support only the claim of exclusive parental control analyzed above, and that is unworthy of review. They require no review of the standard of proof employed in making findings of fact or indeed any procedural aspect of the inquiries to date because most are admitted and the rest uncontroverted.

C. Kentucky's Broad Statute, a Minority Form Among the States, If Construed Here Would Not Reach the Majority Types of Restrictive Laws.

Kentucky's grandparent visitation statute, unlike many of the various other forms adopted by states, does not require proof of a flaw or breakup of the nuclear family, from death, divorce, or separation, as a condition of visitation. It does not require proof that denial of visitation would adversely affect the child, but bases visitation upon a finding that it is in the best interest of the child. Petitioners' principal argument to the Kentucky Supreme Court, based upon a series of articles [most of them cited in a dissenting opinion (828 S.W.2d @ 637)], was that the statute thus is too broad. This scope of the law should defeat certiorari.

A substantial majority of other states have enacted grandparent visitation laws with specific conditions precedent, such as death of a parent or divorce. [A table of state laws compiled by counsel for the petitioners and exhibited with their brief to the Kentucky Supreme Court is the Appendix to this brief.]

The flaw or threat to the nuclear family by divorce or death of either parent is missing here, thus a ruling either way in this action would not address statutory schemes in other states except in theory. And as the claimed issue is well settled, review would be stale and unnecessary. Kentucky plainly has followed this court's directions in all respects and afforded due process to all concerned, while joining the united jurisprudence of the states upon grandparent visitation laws.

D. This Case Was Properly Decided Under State and Federal Law.

By application, the Kentucky grandparent visitation statute requires consideration of the constitutional interests of others. In *Baker* v. *Perkins,* 774 S.W.2d 129 (Ky. App. 1989), the trial court denied grandparent visitation just because the custodial parent objected to it. Because parental objection to visitation must be present in every disputed case, otherwise the statute would not be invoked, the court held it was alone insufficient to deny visitation (774 S.W.2d pp. 129-130):

> "This reasoning effectively substitutes 'wishes of the custodial parent' for 'best interest of the child' as the standard by which to grant or deny visitation rights. Inasmuch as it does so it contravenes KRS 405.021. That statute gives grandparents the right to have a court determine whether visitation would be in the best interest of their grandchildren. As a part of this determination, the court should, of course, take into consideration the custodial parent's attitude, and the possibility of conflict. However, the evaluation cannot stop there. There are other considerations, including the nature of the relationship between the child and her grandmother, the preferences of the child, and the mental and physical health of the parties.
>
> [Footnote omitted.]
>
> "In other words, some risk/benefit analysis must be made. The circuit court needs to ascertain whether the child would benefit from visitation with her grandmother. Against this the court should weigh the possibility that the animosity between [the child's] mother and grandmother is so strong that visitation would affect [the child] adversely."

This definitive opinion of the statute is sound as a matter of state law. Such evaluation and balancing of interests

comports top, edge and bottom with this court's precedents, reviewed ante, as a matter of federal law.

In analyzing the due process issue from *Meyer* v. *Nebraska, supra,* the Kentucky Supreme Court found, in the present case (828 S.W.2d @ 632):

> "[I]t is not unreasonable for the state to say that the development of a loving relationship between family members is desirable and the arbitrariness of the statute is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interest of the child."

Varying interests of the parents, the child, the state, and even the grandparent were weighed and a rational decision based thereon, as found appropriate in *Meyer* v. *Nebraska, supra,* and its progeny, as well as *Baker* v. *Perkins, supra.* That is completely within the holding in *Stanley* v. *Illinois, supra,* upon federal procedural and substantive due process.

Although founded in the police power or Tenth Amendment powers the state has substantial and recognized interests as society's representative in these family matters where laws are resisted as intrusive. Yet aside from those general and paternal powers the state has a private and essentially personal trust to perform in intrafamily disputes, especially where the Fourteenth Amendment liberty interests of parents and their children might diverge. The state protects children's rights as parens patriae as well as society's rights. *Stanley* v. *Illinois, supra,* p. 652; *Prince* v. *Massachusetts, supra,* pp. 165-166 (quoted ante); *Santosky* v. *Kramer, supra,* p. 766, and dissenting opinion.

The parens patriae interests of states logically would include those peculiar to and assertable by the child if sui generis or represented by a guardian ad litem. In this

regard such interests (whether identical, overlapping, or separate compared to those of parents or the state) may have these facets in cases arising under grandparent visitation laws:

First is the "legitimate state purpose of promoting and protecting the child's welfare," recognized in *Barry* v. *Barrale,* 598 S.W.2d 574, 581 (Mo. App. 1980), and following this court's precedents in *Stanley* v. *Illinois, supra,* p. 557, and *Prince* v. *Massachusetts, supra,* p. 165, among others; *In re J.L.L.,* 402 S.W.2d 629, 634 (Mo. App. 1966), expresses it in clear and vivid terms:

> "[T]he issue of the welfare of the child . . . is an issue always to be kept in view in all legal proceedings involving the . . . control of a minor child as to which the state stands in the relation of parens patriae. In other words, when a minor child is brought within the jurisdiction of a court . . ., the child becomes the ward of the court; and in determining the question of its ultimate disposition, the child's well-being is of paramount consideration, and the rights and claims of the contending parties, *even in the case of the parents themselves,* must be subordinated to what the court may conclude will be for the best interests of the child;"

Second, visitation promotes continuation of a relationship regarded as socially vital and worthy of promotion rather than destruction, at least for petty reasons, *King* v. *King, supra,* 828 S.W.2d @ 632; *Bryan* v. *Bryan,* 132 Ariz. 353, 356, 645 P.2d 1267, 1270 (Ct. App. 1982) (Visitation allows at least partial continuance of an earlier established close relationship); *Lehrer* v. *Davis,* 214 Conn. 232, 239, 571 A.2d 691, 695 (1990) (The "importance to children of stability and continuity in their close relationships is well recognized. Psychiatrists and psychologists . . . unanimously counsel that children should maintain and retain

meaningful relationships and that to deny them from continuing contacts is a deprivation. . .");

Third, grandparent visitation cements the existing kinship circle of a child's environment so vital to development and happiness, the feeling of belonging, of being included, and of being worthy in the eyes of others, of experimenting in conduct, diet, inquiry, or association without the pressure of condemnation or punishment, or the tension caused by the presence of parents but with the loving care and protection of one's own; *King* v. *King, supra,* (". . . a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied."); *In re Tremayne Quame Idress R.,* 286 P.Sup. 480, 487, 429 A.2d 40, 44 (1981) ("Kinship ties are still very important in our society. A sense of closeness to relatives can be critical to a child's wholesome and happy development.");

Fourth, visitation helps the child learn his or her heritage, a sense of geographic and societal position, pride, accomplishment and involvement. A child has an interest "in maintaining a connection with his 'roots'." *In re LaRusso,* 9 Fam.L.Rep. (BNA) 2646, 2647 (NY Fam. Ct. 1983). Accord, *People ex rel. Simmons* v. *Sheridan,* 98 Misc. 328, 332, 414 N.Y.S. 2d 83, 85 (Fam. Ct. 1979), aff'd. sub nom. *People ex rel. Sibley* v. *Sheppard,* 79 A.D. 896, 435 N.Y.S.2d 871 (1980) and 54 N.Y.2d 320, 429 NE2d 1049, 445 N.Y.S.2d 420 (1981);

Fifth, visitation helps in protection of the child's interests when faced with abusive, cold, harsh, neglectful, distracted, demanding, or impaired parents, or a difficult or unsuitable home environment, school, or community, through a relationship based upon love and respect, but short of counselling, foster care, changing custody, or other

drastic remedies, and prior to an age when religious faith may be possible or meaningful;

Sixth, visitation protects the grandchild from the attitudes and efforts by vindictive parents who deny current contact with or knowledge of grandparents, thereby causing the grandchild to suffer irreplaceable loss based upon differences to which he usually is not a cause, party or intermediary. *King* v. *King, supra; In re LaRusso, supra; Barry* v. *Barrale, supra; Layton* v. *Foster,* 95 A.D.2d 77, 466 N.Y.S.2d 723 (1983), aff'd 61 N.Y.2d 747, 460 NE2d 1351, 472 N.Y.S.2d 916 (1984). It might be added that the child as hostage to the situation may receive but does not necessarily accept the existence or grounds of the gulf in relations as justification for denial of contact with an otherwise suitable grandparent, and with a spat such as this one the parents themselves may grow up and discard it.

CONCLUSION

Respondent borrows with envy this compelling summary of the New Jersey Supreme Court in *Mimkon* v. *Ford,* 66 N.J.L. 426, 437, 332 A.2d. 199, 204-205 (1975):

> "It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of the child's experience and there are benefits which devolve upon the grandchild from

the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known."

The petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE/STATUTE CITATION	CONDITIONS PRECEDENT: NONE	DEATH	DIVORCE	OTHERS
Alabama Code § 30-3-4		X	X	
Alaska Stat. § 25.24.150(a)		X	X	
Arizona Rev. Stat. § 25-337.01A		X	X	
Arkansas Stat. § 9-13-103		X	X	
California Civ. Code § 4601			X	
Colorado Rev. State. § 19-1-117		X	X	
Connecticut Gen. Stat. § 46b-59	X			
Delaware Stat. T10 § 950 (7)	X[1]			
Florida Stat. § 752.01 (1)		X	X	Parent has abandonded the child
Georgia Code § 19-7-3		X	X	Proof of special circumstances showing visitation necessary to protect the child's best interest
Hawaii Rev. Stat. § 571-46 (7)			X	
Idaho Code § 32-1008				Substantial relationship
Illinois Stat. ch. 110.5 ¶ 11-7.1		X		
ch. 40 § 607(b)		X	X	
Indiana Code § 31-1-11.7-2		X	X	
Iowa Code § 598.35		X	X	Child in foster home
Kansas Stat. § 38.129			X	Substantial contact of GP/child
Kentucky Rev. Stat. § 405.021(a)	X			
Louisiana Rev. Stat. § 9:572(a)		X	X	
Maine Rev. Stat. T19 § 752(6)			X	
Maryland Fam. Code § 9-102(1)			X	
Massachusetts Gen. ch. 119 § 39D		X	X	
Michigan Comp. Laws § 722.27(b)		X	X	
Minnesota Stat. § 257.022		X	X	Child lived with GP 12 months or more
Mississippi Code § 93-16-3		X	X	GP supported child for 6 months or visited regularly including overnight for greater than 12 months
Missouri Stat. §452.402(3)		X	X	Visitation has been unreasonably denied for more than 90 days
Montana Code § 40-9-102	X			
Nebraska Rev. Stat. § 43-1802		X	X	
Neveda Rev. Stat. § 125A.340		X	X	Parental rights terminated
New Hampshire Rev. Stat. § 458.17 (VI)			X	
New Jersey Stat. § 9:2-7.1		X	X	
New Mexico Stat. § 40-9-1 & 2		X	X	Child lived with GP for 6 months or more
New York Dom. Rel. § 72 & 240		X	X	
North Carolina Stat. § 50-13.2 & 13.2A & 5013.5(j)		X	X	
North Dakota Cent. Code §14-09-05.1	X			
Ohio Rev. Code § 3109.11		X		
Oklahoma Stat. T10 § 5	X			
Oregon Rev. Stat. § 109.121	X			
Pennsylvania 23 Cons. Stat. §§ 5311, 5312 & 5313		X	X	Child lived with GP 12 months or more
Rhode Island Stat. §§ 15-5-24.1 & 24.2		X	X	GP repeatedly attempted visitation and was denied over a period of 12 months or more, no other means but court ordered with clear and convincing evidence that the parents' decision is unreasonable
South Carolina Code §20-7-420(33)	X			
South Dakota Code § 25-453		X	X	
Tennessee Code § 36-6-301	X			
Texas Fam. Code § 14.03(e)		X	X	Incarceration; substantial contact; incompetence; parental rights terminated with no adopdon; child lived with GP 6 months or more
Utah Code § 30-5-2		X	X	
Vermont Stat. T 15 §§ 1011(a) & 1012		X	X	Abandonment; mental or physical disability
Virginia Code § 20-107.2			X	
Wash. Rev. Code § 26.09.240	X			
West Virginia Code § 48-2-15b & 48-2B-1		X	X	
Wisconsin Stat. § 767.245	X[2]			
Wyoming Stat. § 20-2-113(c)		X	X	

[1] Although the Delaware statute has no condition precedent, it contains a subsection which prohibits the granting of grandparent visitation rights over the objection of the natural or adoptive parents who are cohabitating as husband and wife.

[2] Although the Wisconsin statute has no condition precedent, conditions have been imposed judicially, see Van Cleve v. Hemminger, 415 N.W. 2d 571 (1987).